Supreme Court, U.S.
FILED
DEC 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1958

In the Supreme Court of the United States

OCTOBER TERM, 1989

SUPREME BEEF PROCESSORS, INC., PETITIONER

v.

ROBERT YAQUINTO, JR., TRUSTEE FOR
CARAVAN REFRIGERATED CARGO, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General
THOMAS W. MERRILL
Deputy Solicitor General
MICHAEL R. DREEBEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel
ELLEN D. HANSON
Associate General Counsel
CECELIA E. HIGGINS
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTIONS PRESENTED

1. Whether, in a motor carrier's civil action against a shipper for undercharges based on a filed tariff rate, a court is required under the primary jurisdiction doctrine to refer to the Interstate Commerce Commission the question whether the carrier's assessment of the tariff rate would involve an unreasonable practice in violation of 49 U.S.C. 10701(a).

2. Whether the court of appeals correctly held that petitioner's "government-carrier" defense was not asserted in a timely way when raised for the first time on a motion for reconsideration.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	5
Conclusion	19

TABLE OF AUTHORITIES

Cases:

A.J. Poor Grain Co. v. *Chicago, B.&O. Ry.*, 12 I.C.C. 418 (1907)	11
Acceptable Forms of Requests for Operating Authority, 133 M.C.C. 328 (1984), aff'd and rev'd *sub nom. American Trucking Ass'ns* v. *ICC*, 659 F.2d 452 (1981), mandate enforced, 669 F.2d 957 (5th Cir. 1982) cert. denied, 460 U.S. 1022 (1983)	9
American Trucking Ass'ns v. *Atchison T.&S.F. Ry.*, 387 U.S. 397 (1967)	12
Arizona Grocery Co. v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932)	7, 15
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981)	6
Baltimore & O.R.R. v. *United States*, 305 U.S. 507 (1939)	11
Burlington Northern Inc. v. *United States*, 459 U.S. 131 (1982)	15, 16
Carriers Traffic Serv., Inc. v. *Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989)	16
Central & Southern Motor Freight Tariff Ass'n v. *United States*, 757 F.2d 301 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985)	9, 14
Great Northern Ry. v. *Merchants Elevator Co.*, 259 U.S. 285 (1922)	7, 14

Cases—Continued: Page

Hewitt-Robins Inc. v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) 7-8, 14, 16, 17
ICC v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) 12
ICC v. *Atlantic Coast Line R.R.*, 383 U.S. 576 (1966) 7, 17
ICC v. *Illinois C.R.R.*, 215 U.S. 452 (1910) 8
INF, Ltd. v. *Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989) 17
Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation, 335 I.C.C. 403 (1969) 16
Keogh v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) 11, 14
Louisville & Nashville R.R. v. *Central Iron & Coal Co.*, 265 U.S. 59 (1924) 7
Louisville & Nashville R.R. v. *Maxwell*, 237 U.S. 94 (1915) 3, 6, 11
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) 7, 16
Maislin Industries, U.S., Inc. v. *Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989), petition for cert. pending, No. 89-624 ..... 5, 6, 13, 17
Mitchell Coal & Coke Co. v. *Pennsylvania R.R.*, 230 U.S. 247 (1913) 7
Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) 7
National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986) 4, 9, 10, 12
New York, N.H.&H.R.R. v. *ICC*, 200 U.S. 361 (1906) 6
Northern Pacific Ry. v. *Solum*, 247 U.S. 477 (1918) 8
Pennsylvania R.R. v. *International Coal Mining Co.*, 230 U.S. 184 (1913) 15

Cases – Continued: Page

Pennsylvania R.R. v. *United States*, 363 U.S. 202 (1960) 14, 16, 17
Petition for Voluntary Order – Lawfulness of Volume Discount Rates – Motor Common Carrier of Property, 365 I.C.C. 711 (1982) 9
Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) 5, 13
Pittsburgh, C.C. & St. L. Ry. v. *Fink*, 250 U.S. 577 (1919) 7
Rates for a Named Shipper or Receiver, 367 I.C.C. 959 (1984) 9
Regular Common Carrier Conference v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) 13
Seaboard System R.R. v. *United States*, 794 F.2d 635 (11th Cir. 1986) 4, 13
Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates, 1 I.C.C.2d 146 (1984), aff'd *sub nom. Southern Motor Carriers Rate Conference* v. *United States*, 773 F.2d 1561 (11th Cir. 1985) 9
Southern Pacific Transportation Co. v. *Commercial Metals Co.*, 456 U.S. 336 (1982) 6, 13
Southern Pacific Transportation Co. v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984) 4, 15
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) 4, 13, 14
Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 7
T.I.M.E. Inc. v. *United States*, 359 U.S. 464 (1959) 16
United States v. *Associated Transp., Inc.*, 505 F.2d 366 (D.C. Cir. 1974) 16
United States v. *Western Pacific R.R.*, 352 U.S. 59 (1956) 7
Western Transp. Co. v. *Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982) 16

Statutes and regulation: Page

Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 16
Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1466 8
Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 589 .. 7
Interstate Commerce Act, 49 U.S.C. 10101 *et seq.* 1
49 U.S.C. 10101 8
49 U.S.C. 10101 note 8
49 U.S.C. 10101(a)(2) 12
49 U.S.C. 10701(a) 1, 2, 7, 8, 14
49 U.S.C. 10702(b) 14
49 U.S.C. 10704(b)(1) (1982 & Supp. V (1987) 1-2, 8
49 U.S.C. 10721 3
49 U.S.C. 10761(a) 1, 3, 6, 12
49 U.S.C. 10761(b) 14
49 U.S.C. 10762(a)(1) 1, 12
49 U.S.C. 11701(b) (1982 & Supp. V 1987) ... 15
49 U.S.C. 11902 12
49 U.S.C. 11903 12
Interstate Commerce Act (Act of Feb. 4, 1887), ch. 104, 24 Stat. 379 ..... 6, 7
Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 546 8
Motor Carrier Act of 1935, ch. 498, 49 Stat. 543:
§ 216(b), 49 Stat. 558 (49 U.S.C. 316 (1976)) .. 8
§ 218, 49 Stat. 561 14
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 3
§ 4, 94 Stat. 793 12
§ 10(b), 94 Stat. 800 8
28 U.S.C. 1336(b) 17
49 C.F.R. 1312.39(h)(1) 9

Miscellaneous: Page

H.R. Rep. No. 253, 89th Cong., 1st Sess. (1965) .. 16

H.R. Rep. No. 1069, 96th Cong., 2d Sess. (1980) .. 8

1987 ICC Ann. Rep. 8

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1958

SUPREME BEEF PROCESSORS, INC., PETITIONER

v.

ROBERT YAQUINTO, JR., TRUSTEE FOR
CARAVAN REFRIGERATED CARGO, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, regulates interstate transportation by motor carriers. A carrier providing transportation subject to regulation under the Act may do so only if the carrier has an effective tariff on file with the ICC. 49 U.S.C. 10761(a), 10762(a)(1). In order to protect shippers against discriminatory rates, the Act further provides that a carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a). The Act also imposes a requirement that a carrier's "rate[s]" and "practice[s]" be reasonable. 49 U.S.C. 10701(a). The authority to enforce the requirement of reasonable rates and practices is reposed in the ICC. 49 U.S.C.

10704(b)(1) (1982 & Supp. V 1987). If the ICC determines that a carrier is engaging in a practice that is or will be unreasonable, the ICC "shall prescribe the * * * practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987).

2. Petitioner is a major supplier of beef products to the United States government. For several years prior to its bankruptcy, Caravan Refrigerated Cargo, Inc. (Caravan), a motor common carrier, provided refrigerated trucking services to petitioner. Petitioner and Caravan had a longstanding agreement that Caravan would "meet or beat" any rate quoted by a competing motor carrier. Through this arrangement, Caravan secured a steady source of transportation business, and petitioner obtained the assurance of low-cost shipping. Pet. App. B2.

To keep up with changing competitive conditions, petitioner and Caravan continually renegotiated rates. Petitioner relied on the various rates quoted to it by Caravan, and it paid Caravan's bills at those rates. In many instances, however, Caravan failed to file the negotiated rates in tariffs with ICC. As a result, the rates actually quoted and billed to petitioner were significantly lower than those set forth in the applicable tariffs. Petitioner maintains that at the time of the shipments in question it was not aware that Caravan's quoted rates differed from the tariff rates. Pet. App. B2, D2.

3. After Caravan declared bankruptcy, Caravan's trustee filed an adversary action in bankruptcy court to collect the difference between Caravan's tariff rates and the negotiated rates at which petitioner had originally been billed. Pet. App. D2. Petitioner filed an answer and counterclaim, alleging, *inter alia*, that Caravan's conduct in negotiating and charging, but failing to file, its transportation rates constituted an unreasonable practice in violation of 49 U.S.C. 10701(a). Caravan requested the bankruptcy court to refer that issue to the ICC under the primary jurisdiction doctrine. The bankruptcy court, however, denied referral, reasoning that the ICC could provide only advisory findings, and, consequently, that referral would simply result in delay. Pet. App. F1-F2. After the matter was trans-

ferred to the district court, petitioner moved again for referral of the unreasonable-practice issue to the ICC; that motion was also denied. *Id.* at E1-E2. Thereafter, the district court granted summary judgment in favor of the trustee, rejecting petitioner's contention that the rates it had negotiated with Caravan should prevail over the filed rates. *Id.* at D1-D6.[1]

4. The court of appeals affirmed. The court noted that the primary jurisdiction doctrine requires a court to refer to the ICC an issue that falls within the agency's exclusive competence, thereby permitting the agency to apply its expertise and ensuring the uniform development of policy. The court believed, however, that those considerations were not implicated here because the question was simply whether the trustee's claim was governed by 49 U.S.C. 10761(a), which requires a carrier to collect only those rates set forth in its published tariffs. Pet. App. B4. That issue, the court explained, does not bring into play the ICC's primary jurisdiction because, under the "filed rate" doctrine, the Interstate Commerce Act has long been construed to preclude equitable defenses to the tariff rate based on "[i]gnorance or misquotation of rates." Pet. App. B4-B5 (quoting *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915)).

The court found no reason for departing from the filed rate doctrine here. The court dismissed arguments that the pro-competition transportation policy expressed in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, authorized some modification of the filed rate doctrine. The court noted that Congress had thoroughly examined the regulation of transportation policy in amending the Interstate Commerce Act in 1980, but had left untouched the provisions governing the observance of filed rates. Consequently, the court believed, any modification of the filed rate doctrine must emanate from

---

[1] After entry of judgment, petitioner filed a "motion to reconsider," arguing for the first time that, pursuant to 49 U.S.C. 10721, no tariffs were required to be filed for the shipments in question because they were destined for the government. Pet. App. C1-C2. The court considered it "improper" for this argument to be raised after the entry of final judgment, and, alternatively, found it without merit. *Ibid.*

Congress, not the courts. Pet. App. B6-B7 (citing *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)).

The court also rejected petitioner's reliance on the ICC's recent policy statement in *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) [hereinafter *Negotiated Rates I*], in which the ICC announced that it would accept referrals from district courts to determine whether it would be an unreasonable practice for a motor carrier to collect a tariff rate that exceeds a negotiated rate originally charged. The court interpreted *Negotiated Rates* to express the agency's willingness to hear "equitable" defenses to the filed rate doctrine, and concluded that this policy "has, of course, no binding effect upon this court." Pet. App. B8. Instead, the court found the case to be governed by *Southern Pacific Transportation Co.* v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984), which held that a court cannot stay a carrier's tariff collection action pending the outcome of an ICC proceeding to determine the reasonableness of the tariff rate; in such circumstances, the *San Antonio* court stated, the shipper's only remedy is to seek reparations from the carrier in a separate proceeding. *Id.* at 274. The court believed that the same principle precluded referral to the ICC of a shipper's defense that collection of the filed rate would constitute an unreasonable practice.

Finally, the court distinguished the Eleventh Circuit's decision in *Seaboard System R.R.* v. *United States*, 794 F.2d 635, 637 (1986). The court acknowledged that in *Seaboard* the Eleventh Circuit upheld the ICC's application of its unreasonable practice authority to limit the collection of a filed rate. But the court read *Seaboard* to turn on the ICC's conclusion that collection of the tariff rate was barred because the carrier had misquoted a tariff that was not clear on its face. The court thought that the ICC's ability to preclude collection of a filed rate was limited to those circumstances. Pet. App. B10-B11.[2]

---

[2] The court also rejected petitioner's contention that the district court had erroneously refused to consider its government-carrier defense on grounds that it was untimely. Pet. App. B12-B13.

DISCUSSION

This case reflects a widespread problem in the motor carrier industry. Following the substantial deregulation of the industry in the Motor Carrier Act of 1980, increased competition has led to a number of bankruptcy filings by motor carriers. Numerous cases have been filed by carriers (or their receivers) seeking to collect undercharges in factual settings virtually identical to this case. The ICC has responded to this problem by issuing two policy statements. In *Negotiated Rates I*, the ICC declared that it would accept court referrals to determine whether the collection of tariff rates in excess of negotiated rates is an unreasonable practice. In *Petition to Institute Rulemaking on Negotiated Motor Carrier Rates*, 5 I.C.C.2d 623, 626 (1989) [hereinafter *Negotiated Rates II*], the ICC clarified and reaffirmed that policy and went on to say that it would also entertain such claims as an initial matter, without court referral.[3]

We agree with petitioner (Reply Br. 1-2) that the court of appeals' holding—that a district court is not required to refer a shipper's unreasonable-practice claim to the ICC under the primary jurisdiction doctrine—conflicts with the Eighth Circuit's holding in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 879 F.2d 400 (1989), petition for cert. pending, No. 89-624. We also agree with petitioner that the ICC's *Negotiated Rates* policy has been a sufficient source of controversy in the lower courts to warrant this Court's review. Although both this case and *Maislin* present the primary jurisdiction question that has generated this controversy, we believe that *Maislin* may provide the better vehicle for review because the record there, unlike the instant case, includes the Commission's assessment of the facts and its conclusion that an unreasonable practice was committed. Accordingly, we recommend that the Court grant the petition in *Maislin* (in which the ICC is a party respondent) and hold the petition in this case for disposition in accordance

---

[3] *Negotiated Rates II* was issued after the decision in this case.

with the decision in *Maislin*.[4]

1. a. The Interstate Commerce Act requires that carriers file their rates in public tariffs and charge and collect only the filed rates.[5] This requirement was designed to prevent carriers from engaging in rate discrimination that favored some shippers over others. See, *e.g.*, *New York, N.H.&H.R.R.* v. *ICC*, 200 U.S. 361, 391 (1906); *Southern Pacific Transportation Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 343-344 (1982). In a series of cases decided in the early part of this century, the Court developed the principle that neither misquotation by the carrier nor the shipper's ignorance of the tariff rate afforded a defense to the carrier's court action to collect the filed rate (a principle that later came to be called the "filed rate" doctrine).[6] As stated in *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915):

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

---

[4] We have filed a brief urging the Court to grant the petition in *Maislin* and have provided a copy to the parties here.

If the Court does grant the petition in this case to review the proper application of the primary jurisdiction doctrine, we believe it should deny the petition as to the third question presented (Pet. (i)): whether the district court properly rejected petitioner's untimely effort to raise a government-carrier defense. There is no circuit conflict on this point, and petitioner's quarrel with the lower courts raises, at most, a claim of abuse of discretion. Indeed, the court of appeals' affirmance of the district court's ruling on this point (Pet. App. B12-B13) was correct, as petitioner has not explained its failure to raise the defense until its motion for reconsideration.

[5] See Act To Regulate Commerce of 1887, ch. 104, 24 Stat. 379. The current codification of this requirement, as applied to the motor common carriers, is found at 49 U.S.C. 10761(a).

[6] See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 599 (1981) (Stevens, J., dissenting).

See also *Pittsburgh, C.C.& St. L. Ry.* v. *Fink*, 250 U.S. 577, 582 (1919); *Louisville & Nashville R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939).

Maxwell, however, sets forth an important qualification to the filed rate doctrine: the filed rate governs "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. That qualification reflects not only the statutory command that a carrier's rates must be reasonable, 49 U.S.C. 10701(a), but also the parallel principle that the Commission alone can determine the reasonableness of rates. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932) (distinguishing "legal" rates, defined as those stated in the carrier's tariff, from "lawful" rates, representing those determined by the ICC to be reasonable).

The competing demands of the filed rate doctrine and the statutory standard of reasonableness have been reconciled largely through the development of the doctrine of primary jurisdiction. That doctrine requires that "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). The doctrine protects the uniform development of policy by the ICC and ensures application of the agency's expertise to questions requiring intimate familiarity with conditions of the regulated industry. *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 255-259 (1913); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956); *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 580, 594 (1966); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976). Moreover it is clear that the primary jurisdiction doctrine governs not only a claim that a carrier's *rates* are unreasonable, but also a similar claim directed at its *practices*.[7] *Hewitt-Robins Inc.* v. *Eastern*

---

[7] Congress did not address the question of unreasonable carrier "practices" in the original Interstate Commerce Act (Act of Feb. 4, 1987), ch. 104, 24 Stat. 379. In the Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 589, Congress gave

Freight-Ways, Inc., 371 U.S. 84, 87 (1962) (primary jurisdiction applies to a claim that a carrier's misrouting constitutes an unreasonable practice); *Northern Pacific Ry.* v. *Solum*, 247 U.S. 477, 483 (1918) ("the rule which requires * * * preliminary determination of administrative questions by the Commission applies * * * to any practice of the carrier which gives rise to the application of a rate"). Upon a determination that a carrier has committed an unreasonable practice, the Commission is empowered, as it is where it makes a finding of unreasonable rates, to prescribe an appropriate practice to be followed in the future. See 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987).

b. The ICC's *Negotiated Rates* policy was formulated against the background of the foregoing principles. The policy stems from the ICC's experience under the more competitive environment introduced by the Motor Carrier Act of 1980. The 1980 Act significantly relaxed entry requirements, causing the number of licensed motor common carriers to double.[8] The Act also permitted carriers to operate in both a common and contract capacity, thereby freeing them to tailor rates to individual shippers.[9] In recent years, the ICC has also routinely given com-

---

conferred power upon the Commission to determine whether a railroad carrier's practices were unreasonable and to prescribe a different practice for the future. See *ICC* v. *Illinois C.R.R.*, 215 U.S. 452, 475-477 (1910). In the Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 546, Congress extended that principle by imposing a duty on all rail carriers to engage in "just and reasonable * * * practices." When Congress gave the Commission authority to regulate motor carriers in 1935, it applied the same dual requirement that motor carriers establish and observe reasonable rates and practices. Motor Carrier Act of 1935, ch. 498, § 216(b), 49 Stat. 558 (codified at former 49 U.S.C. 316 (1976)). In 1978, Congress revised, codified, and enacted Title 49 of the United States Code into positive law, without substantive change (Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1466, 49 U.S.C. 10101 note), consolidating in one section the requirement of reasonable rates and practices for all carriers the Commission regulates. 49 U.S.C. 10701(a).

[8] Prior to the Motor Carrier Act of 1980, there were approximately 17,000 regulated motor common carriers. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 12 (1980). In 1987, there were over 35,000 such carriers. 1987 ICC Ann. Rep. 125, App. E, Table 1.

[9] The Motor Carrier Act of 1980, Pub. L. No. 96-296, § 10(b), 94 Stat. 800, repealed the limitations on a carrier's ability to hold both common and con-

mon carriers broader operating authority than it did previously,[10] and has permitted pricing activities that once were considered unlawful, including volume discounts and common carrier rates that are specifically limited to a named shipper.[11]

As a consequence, carriers today regularly offer discounts from their published rates to particular shippers. For their part, shippers regularly tender freight in reliance on these offers. The ICC has sought to facilitate competitive setting of rates by allowing motor carriers to file tariffs independently lowering their rates on one day's notice.[12] 49 C.F.R. 1312.39(h)(1). Nevertheless, it is clear that some common carriers have failed to file their individually negotiated rates with the ICC. See *Negotiated Rates I*, 3 I.C.C.2d at 104-105. In the wake of bankruptcies by trucking companies, auditors have frequently found that the rates billed and collected were not the applicable rates on file at the ICC. These discoveries have led to numerous legal actions by receivers or trustees seeking recovery of undercharges from unsuspecting shippers. See Shippers National Freight Claims Council, Inc. Amicus Br. 3-4.

As these collection actions became more common, a national shippers' association asked the ICC to address the problem.[13]

---

tract carrier authority. A contract carrier may charge a rate to an individual shipper that is different from the rate charged other, similarly situated shippers. *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d 301, 310 n.44 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1975).

[10] A carrier may now readily obtain authority to transport virtually all commodities throughout the contiguous 48 states. See *Acceptable Forms of Requests for Operating Authority*, 133 M.C.C. 328 (1984), aff'd in relevant part and rev'd on other grounds *sub nom. American Trucking Ass'ns* v. *ICC*, 659 F.2d 452 (5th Cir. 1981), mandate enforced, 669 F.2d 957 (5th Cir. 1982), cert. denied, 460 U.S. 1022 (1983).

[11] See *Petition for Voluntary Order—Lawfulness of Volume Discount Rates—Motor Common Carrier of Property*, 365 I.C.C. 711 (1982), and *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984).

[12] *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C. 2d 146 (1984), aff'd *sub nom. Southern Motor Carriers Rate Conference* v. *United States*, 773 F.2d 1561 (11th Cir. 1985).

[13] The association proposed a rule declaring that whenever a carrier and shipper have negotiated a rate and the carrier then fails to file an appropriate

In *Negotiated Rates I*, the ICC responded by announcing that it would conduct an "advisory analysis," on referral from a court under the primary jurisdiction doctrine, to "determine * * * whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect." 3 I.C.C.2d at 107.

The courts' response to *Negotiated Rates I* has been mixed. Some courts, like the court of appeals here, have viewed the ICC's policy statement as simply offering to render an "advisory opinion," and have declined to accord the statement it any weight. Other courts have accepted the invitation to refer unreasonable practice claims to the ICC, and have concluded that the Commission's determinations are binding unless set aside under traditional standards governing judicial review of agency action. Compare Shippers National Freight Claims Council, Inc. Amicus Br. App. 8a-17a with *id.* at 18a-23a.

To clarify its policy and to respond to another petition from a shippers' association, the Commission issued a second statement in *Negotiated Rates II, supra.* This statement explained that the ICC's source of authority for its negotiated rates policy is the statutory requirement that a carrier's practices must be reasonable; consequently, its determinations constitute a legal, rather than an "equitable," defense. 5 I.C.C.2d at 628 & n.11. Moreover, to remove any confusion resulting from use of the term "advisory opinion" in *Negotiated Rates I*, the ICC also explained that its determinations result in "binding and dispositive" orders, subject to review only for arbitrariness and caprice. *Id.* at 624, 625. Finally, to protect its jurisdiction in light of the refusal of some courts to refer such claims, the ICC announced that it would rule on negotiated-rates allegations by shippers without awaiting court referral. *Id.* at 635-636.

---

tariff, the negotiated rate is the maximum reasonable rate that the carrier may charge, provided that the shipper entertained a good-faith belief that the negotiated rate was legally applicable. The Commission rejected that proposal in favor of a case-by-case examination of a carrier's practices. 3 I.C.C.2d at 102-103.

2. Contrary to the court of appeals, we do not believe that the filed rate doctrine forecloses reference to the ICC of unreasonable-practice claims under its *Negotiated Rates* policy. In our view, analysis of this issue embraces two interrelated questions: (1) whether the ICC has authority to determine that a motor carrier is committing an unreasonable practice by negotiating and charging a shipper a rate that it fails to file in a tariff with the ICC, and then at a later date seeking to recover from the shipper the higher rate actually reflected in the filed tariff; and (2) whether a federal court should stay a tariff collection action by a carrier pending a determination by the ICC whether such an unreasonable practice has occurred.

a. This Court's many decisions holding that a *court* may not recognize equitable defenses to a carrier's right to collect a filed tariff do not qualify the *Commission*'s power to implement the statutory requirement of reasonableness. To the contrary, that power has long been recognized as a co-equal requirement of the Act. See *Maxwell,* 237 U.S. at 97; *Keogh* v. *Chicago & Northwestern Ry.,* 260 U.S. 156, 163 (1922) (the tariff rate governs "[u]nless and until suspended or set aside" by the ICC). For courts to determine in individual cases whether enforcement of the filed rate is inequitable would seriously undermine the ICC's primary jurisdiction and would give rise to a lack of uniformity in application of the statute. Those considerations, however, are absent when the ICC itself determines that a carrier has committed an unreasonable practice that bars its collection of the filed rate.

It is true that the ICC has historically rejected claims that misquotation of rates impairs the carrier's right to collect the filed rate. See *A.J. Poor Grain Co.* v. *Chicago, B.&O. Ry.,* 12 I.C.C. 418, 422-423 (1907). That rule was deemed necessary to implement the strong emphasis of the original Interstate Commerce Act on preventing discrimination among shippers. Indeed, in its early administration of the Act, the ICC used its unreasonable practice jurisdiction to enforce the antidiscrimination rules governing carriers. See *Baltimore & O.R.R.* v. *United States,* 305 U.S. 507, 521-522 (1939). But the Commission's un-

reasonable practice jurisdiction is not confined to its early scope. The Commission is free to revise its interpretation of the statutory provisions it administers to respond to changed conditions. *American Trucking Ass'ns* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416 (1967); *Maislin*, 879 F.2d at 405-406. That principle has particular force here, in light of Congress's substantial amendment of the transportation policy of the United States in the Motor Carrier Act of 1980.

The 1980 Act directs the ICC to apply a new policy of "promot[ing] competitive and efficient transportation services," in order to achieve, among other things, "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping * * * public."[14] This Court has recognized that "[t]he legislative history of the Act is clear that * * * Congress wanted the forces of competition to determine motor-carrier tariffs." *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 367 (1984). The changes wrought by the 1980 Act support the ICC's conclusion that "our former policy of penalizing shippers for carriers' mistakes regardless of the circumstances is unnecessary and inappropriate to deter discrimination under today's statutory scheme." *Negotiated Rates I*, 3 I.C.C.2d at 105.

The ICC's *Negotiated Rates* policy does not suggest that carriers are free to disregard their statutory obligation to file rates in proper tariffs with the ICC (49 U.S.C. 10762(a)(1)), nor does it announce a universal rule that a negotiated rate prevails over a filed rate (49 U.S.C. 10761(a)).[15] Compare *Regular Common*

---

[14] Motor Carrier Act of 1980, Pub. L. No. 96-296, § 4, 94 Stat. 794 (codified at 49 U.S.C. 10101(a)(2)).

[15] Nor does the ICC's policy transgress other provisions that support the filed rate requirement. The Act creates civil liability for a shipper's knowing receipt of a rebate (49 U.S.C. 11902) and criminal liability for the knowing provision or receipt of transportation at below-tariff rates (49 U.S.C. 11903). A shipper that violates those provisions by *knowingly* paying a negotiated but unfiled transportation rate would be barred from taking advantage of the Commission's *Negotiated Rates* policy, because reliance on the applicability of the negotiated rate must be reasonable. And a carrier that violates those provisions is hardly in a position to complain if it is later denied the windfall of a higher tariff rate that exists only because it ignored its duty to make a timely tariff filing.

Carrier Conference v. *United States,* 793 F.2d 376, 379 (D.C. Cir. 1986). Rather, this policy addresses a particular course of conduct by a motor carrier consisting of:

> (1) [N]egotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates.

Negotiated Rates II, 5 I.C.C.2d at 628 n.11. The *Negotiated Rates* policy announces the Commission's general conclusion that when the described course of conduct is established, the carrier will be found to have engaged in an unreasonable practice. And the policy recognizes that an appropriate remedy for such an unreasonable practice is to deny the carrier any recovery of tariff charges above and beyond the negotiated rate. As such, we believe that the *Negotiated Rates* policy represents a reasonable effort, by the agency that Congress charged with the responsibility for administering the Act, to reconcile the competing directives to foster competition while at the same time preventing discrimination between shippers.[16] See *Commercial Metals Co.,* 456 U.S. at 352 ("The remedies for a carrier's violation of the regulations are best left to the ICC for such resolution as it thinks proper."); *Maislin,* 879 F.2d at 405; *Seaboard System R.R.* v. *United States,* 794 F.2d 635, 638 (11th Cir. 1986).

Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409 (1986), does not require a different result. In that case, the Court held that the policies expressed in the 1980 Act were not sufficient to justify overruling this Court's decision in

---

[16] Because the Commission has not had the opportunity to rule on petitioner's unreasonable-practice claim in this case, we take no position on whether Caravan's practices in this case were unreasonable. We do believe, however, that the allegations furnished a sufficient basis for referral. See Spiritas Afft. 2-4 (petitioner's president); Newbold Afft. 2-3 (Caravan's former vice-president); Moore Afft. 2-3 (Caravan's former chairman) (all describing negotiation of rates between the parties and the grounds for petitioner's reliance on them).

Keogh v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), which had precluded antitrust treble damages actions based on tariff rates filed under an ICC-approved agreement. *Square D* relied heavily on principles of stare decisis (476 U.S. at 424); the Court reasoned that Congress was presumed to be aware of the *Keogh* rule in revising the statute, but had not expressly rejected its holding. But, in our view, that consideration does not constrain the *Commission*'s power to reinterpret or to change the manner in which it implements its governing statute. Indeed, the Commission would be remiss if it failed to revisit its past views to take account of Congress's articulation in 1980 of a new pro-competition policy in regulating motor carriers.[17]

In our judgment, the ICC's *Negotiated Rates* policy reflects an appropriate exercise of the ICC's authority under the reasonable-practice provision (49 U.S.C. 10701(a)). Because issues of reasonableness require referral to the ICC under the primary jurisdiction doctrine, *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. at 291, the district court in this case should have referred the unreasonable practice issue to the ICC for its initial determination, while retaining jurisdiction to review that determination when the matter is returned to court. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960); *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc., supra.*

b. The court of appeals suggested another reason, which it also derived from the filed rate doctrine, for refusing to refer petitioner's unreasonable-practice claim to the ICC: even if the ICC is willing to hear petitioner's claim, "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of

---

[17] The court of appeals also erroneously believed that this case presents an "even more persuasive case for deference" than *Square D* because the 1980 Act "creates an *exemption* from filing requirements for contract carriers," but did not do so for common carriers (Pet. App. B7). The court's statement, however, is incorrect: Congress did not add a new exemption for contract carriers in the 1980 Act. The Commission was given authority to exempt contract carriers from filing tariffs in the Motor Carrier Act of 1935, ch. 498, § 218, 49 Stat. 561 (codified at 49 U.S.C. 10702(b) and 10761(b)). The 1980 Act did not alter that authority. See *Central & Southern Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d at 305-306.

the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission." Pet. App. B9 & n.6 (citing *Southern Pacific Transportation Co.* v. *San Antonio*, 748 F.2d 266, 274 (5th Cir. 1984)). In other words, in the court of appeals' view, even if the ICC would have authority to declare respondent's actions an unreasonable practice, the filed rate doctrine would preclude a court from staying respondent's action to collect the full tariff charges pending resolution of the unreasonable-practices claim by the Commission.

We agree that, as a general matter, when disputes arise over the reasonableness of applying a tariff rate or provision the shipper must pay the asserted tariff rate, then contest its reasonableness in a separate reparations proceeding before the Commission. See *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *Arizona Grocery Co.*, 284 U.S. at 384; *San Antonio*, 748 F.2d at 274. There are two reasons in the usual case for declining to stay a carrier's undercharge action. First, the carrier has an interest in prompt payment of a properly filed rate. Second, the shipper has an adequate remedy in reparations proceedings if the rate is subsequently found to be unreasonable, see 49 U.S.C. 11701(b) (1982 & Supp. V 1987). Compare *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982).

Those considerations, however, have little application in the circumstances envisioned by *Negotiated Rates*. In the typical case governed by the ICC's policy, the motor carrier is insolvent and hence is unable to satisfy any subsequent reparations order. In these circumstances, enforcement of the filed tariff without referral to the ICC would effectively nullify the reasonableness requirement of the statute: it would undermine the ICC's meaningful exercise of its unreasonable-practice jurisdiction and deny the shiper an adequate remedy. The carrier, in contrast, can assert no offsetting equity in insisting upon prompt payment when the collection of the rates may entail an unreasonable practice and the carrier is not prepared later to reimburse the shipper. The carrier simply has no right to collect

rates or to engage in practices that the ICC finds are unlawful. Compare *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. at 520; *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960). In this limited situation, therefore, where the ICC has determined to accept referrals in the midst of a collection action, a court should stay judicial proceedings pending referral of the unreasonable practice charge to the Commission. Compare *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc., supra*; *Carriers Traffic Serv., Inc.* v. *Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989) (approving referral of an unreasonable-notation claim to the ICC); *Western Transp. Co.* v. *Wilson & Co.*, 682 F.2d 1227, 1231-1232 (7th Cir. 1982). See also *Burlington Northern Inc.* v. *United States*, 459 U.S. at 142 (structuring court review of ICC determinations to preserve the ICC's primary jurisdiction and to protect parties unable to benefit from later reparations proceedings).[18]

3. We believe that the validity of the ICC's *Negotiated Rates* policy is an issue meriting review by this Court. There is a conflict among the circuits on the issue of whether the primary jurisdiction doctrine requires referral of a *Negotiated Rates*

---

[18] The referral of unreasonable practice claims by a court to the Commission is clearly appropriate even though there is some uncertainty about whether a shipper could obtain reparations for an unreasonable practice in an action originally filed with the Commission, see U.S. ~~Amicus~~ Br. in Maislin at 11-12. In *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), the Court held that the Motor Carrier Act of 1935 did not provide a mechanism for either the courts or the Commission to award reparations based on *past* unreasonable tariff rates. In 1965, Congress overruled *T.I.M.E.* and provided an express right for shippers to recover reparations from carriers based on charges found by the Commission to be unreasonable. Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652; H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965). Courts and the Commission have interpreted this legislation to require a shipper to seek reparations in court, whereupon the court refers to the Commission the issue of reasonableness. See *United States* v. *Associated Transp., Inc.*, 505 F.2d 366, 368-369 (D.C. Cir. 1974); *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403 (1969). Even before the 1965 legislation, however, the Court had limited *T.I.M.E.* to *rate*-reasonableness determinations; a claim of past unreasonable *practices* could be maintained and required referral to the Commission. *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc., supra* (misrouting claim).

claim to the ICC. Compare Pet. App. B13 with *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc., supra; INF, Ltd.* v. *Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989).[19] The petitions in both this case and *Maislin* present the question whether the ICC's *Negotiated Rates* policy statement is compatible with the filed rate doctrine. Nevertheless, we believe that *Maislin* may provide a preferable vehicle for review by this Court. The district court in *Maislin* granted referral, and, as a result, the ICC applied its *Negotiated Rates* policy in a concrete setting and determined that enforcement of the full tariff charges would constitute an unreasonable practice. In this case, in contrast, the court refused to refer the matter to the Commission, and thus the Court would be deprived of the views of the ICC as to whether the carrier's conduct was or was not unreasonable.

The remaining consideration is whether the Court should await further analysis of the *Negotiated Rates* issues by the lower courts. Although there is now a circuit conflict on the primary jurisdiction question, only one court of appeals has actually reviewed an ICC decision promulgated under the ICC's new policy. *Maislin, supra.* Moreover, no court of appeals has examined the ICC's clarification of its views in *Negotiated Rates II.* Nevertheless, we believe that the legal issues have been adequately ventilated and that lower courts would benefit considerably from this Court's prompt review of the issue. Nearly

---

[19] *Negotiated Rates II* permits a shipper to proceed directly to the Commission, without requiring a court referral. Nevertheless, we believe that the conflict remains of practical importance. A shipper's direct filing with the ICC does not guarantee that Commission will be able to act before a carrier reduces its claim to judgment. A direct filing with the Commission may also bifurcate judicial review of the ICC's order from the undercharge action. Cf. *Pennsylvania R.R.* v. *United States*, 363 U.S. at 205-206; *ICC* v. *Atlantic Coast Line R.R., supra.* This Court has previously expressed its preference for a court to refer an unreasonable practice claim to the Commission in a similar setting. *Hewitt-Robins*, 371 U.S. at 85 n.*. See also 28 U.S.C. 1336(b).

every circuit has a pending case regarding the application of *Negotiated Rates*.[20] The issue has also provoked inconsistent decisions from the district courts. Compare Pet. App. G7-G9 (granting referral) with Pet. App. H1-H5 (denying referral). The ICC informs us that it has received 117 *Negotiated Rates* cases on referral from courts, and 80 cases filed directly with the agency. We believe that the significance of the ICC's policy in the development of the filed rate doctrine, together with the volume of litigation pending in the lower courts, makes it appropriate for this Court to review the issue in *Maislin* at this time.

---

[20] See *Transtop, Inc.* v. *Delta Traffic Service*, No. 89-1662 (1st Cir. argued Nov. 7, 1989) (referral denied); *Delta Traffic Serv.* v. *Appco Paper & Plastics Corp.*, No. 89-9057 (2d Cir. argued Nov. 16, 1989) (referral denied); *Branch Motor Express* v. *Caloric Corp.*, No. 89-1130 (3d Cir. argued June 27, 1989) (referral granted); *Cooper* v. *Delaware Valley Shippers Ass'n*, No. 89-3259 (4th Cir. argued Dec. 7, 1989) (referral granted in some cases and denied in others); *Orr* v. *Sewell Plastics, Inc.*, No. 89-5108 (6th Cir. argued Nov. 13, 1989) (referral granted); *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Elec. Corp.*, No. 89-1329 (7th Cir. docketed Feb. 17, 1989) (referral denied); *West Coast Truck Lines* v. *Weyerhaeuser Co.*, No. 89-35115 (9th Cir. argued Oct. 3, 1989) (referral granted); and *Feldspar Trucking Co.* v. *Greater Atlanta Shippers Ass'n*, No. 89-8450 (11th Cir. docketed June 9, 1989) (referral denied).

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in accordance with the disposition of the petition filed in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

THOMAS W. MERRILL
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

CECELIA E. HIGGINS
Attorney
Interstate Commerce Commission

DECEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262 203/00664